No. 12524.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

S. V. JUBAS, doing business under the fictitious name and style of WEST COAST JOBBING COMPANY,

Appellant,

vs.

PAUL W. SAMPSELL, trustee in Bankruptcy for the estate of FASHION BOOTERY, a copartnership composed of GENE FAGAN and LEO G. OLSON, Bankrupt,

Appellee.

BRIEF OF APPELLEE

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TABLE OF AUTHORITIES CITED

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BRIEF OF APPELLEE

The issues involved in the above appeal as succintly stated by the appellant are very simple, but we cannot agree with the construction placed by appellant on the District Court's Findings of Fact. The construction placed thereon by appellant would indicate that the trial court found that it was in the usual and ordinary course of the bankrupt's retail business to sell large quantities of merchandise to jobbers for resale without complying with Section 3440 of the Civil Code of California and therefore Jubas should have been absolved from the necessity of complying with that very important statute. It is true that the Court found in Finding VII, page 33, that:

> " custom had arisen and been followed in Los Angeles County, California, whereby retailers of shoes *ignoring Section 3440 of the Civil Code of California, the bulk sales law,* made it a practice to sell surplus and

> obsolete merchandise to jobbers without recording any notice in the office of the County Recorder of the State of California, or publishing said notice as required under the bulk sales law, *and that this custom of ignoring the provisions of Section 3440 was followed in this instance by the bankrupt and the defendant herein,* without any dishonest intent on their part." (Italics ours.)

In Finding IX, the Court found that the parties to said transaction, namely, bankrupt and defendant, could have, without difficulty, recorded and published the required Notice under Section 3440 of the Civil Code of the State of California. [Tr. p. 34.] In Conclusion of Law IV [Tr. p. 35], the Court concluded that notwithstanding the fact that other retailers and jobbers may have violated the provisions of Section 3440 in the past, such custom merely shows a custom to ignore the plain provisions of the law of the State of California, and does not constitute the ordinary course of trade or the usual course of business such as was engaged in by the bankrupt.

We consider the reasoning on which appellant's argument is predicated, to be decidedly specious and begging the question. Section 3440 of the Civil Code of California has been on the statute books in one form or another since 1872. From an examination of Chase California Codes of 1945, it would appear that this statute was first enacted in 1872 and was amended in 1895, 1903, 1917, 1923, 1925, 1939 and in 1945. Apparently this kept pace with the modernized trends of business as time elapsed. With all of these amendments over a period of approximately eighty years, if it were the intention of the Legislature to grant a special dispensation to jobbers of obsolete or surplus merchandise, it would have been very simple

to have added to Section 3440 a provision reading as follows:

> "Provided, however, that the provisions of this section shall not be deemed to apply to a retailer selling a substantial part of his stock in trade in bulk for resale, if the merchandise so sold is obsolete, shop worn, or otherwise unsaleable to the public."

The Legislature has not seen fit to do this and if jobbers in the interest of speed and expediency see fit to take a chance on purchasing merchandise without fulfilling the very simple requirements of Section 3440, they must then accept the consequences of their misplaced efficiency, if called to account.

It is not as though merchants with obsolete or unseasonable merchandise were faced with an insoluble dilemma. Appellant admits that the shoes in question were an accumulation of odds and ends, obsolete, broken sizes, out of style, and novelty shoes which had accumulated during the partnership's existence. (Appellant's brief, p. 4.) If this merchandise had been permitted to accumulate over a long period of time until it had become obsolete, a mere delay of seven days to record and publish the required Notice under Section 3440 of the Civil Code would not have been fatal. If the bankrupt had waited six months, or a year, or two years to dispose of this merchandise, a mere delay of seven days would have made little or no difference. By complying with these simple requirements, the defendant would have been fully protected in his purchase. By reason of his haste to get his hands on the bargain offered, he now finds himself mulcted for the purchase price he paid for these shoes for the sole reason that he bought them in violation of the law and for no other reason.

To urge this Court to reverse this judgment on the ground that certain people in Los Angeles, a small group in a city of almost two million, had set themselves up a system of buying merchandise in violation of the plain provisions of the law, is simply to ask this Court to place the stamp of judicial approval on a violation of the law, and we are certain that this Court will not be influenced by such specious reasoning.

For example, during the thirteen year era of National Prohibition, we all know that the Eighteenth Amendment and the Volstead Act were repeatedly violated not only by bootleggers and moonshiners, but by otherwise law-abiding citizens. The writer of this brief has read in the course of his practice, hundreds of decisions, if not thousands, involving liquor violations. We have yet to see a single instance in which a liquor conviction was reversed on the ground that "everybody is doing it." The same might be said of the income tax law. Everyone knows that many sharpshooters chisel on their income tax by means of trick bookkeeping and concealment of facts regarding their income. Nevertheless, neither the Government nor the Courts will excuse a violation of the income tax law on the ground that a custom has grown up among certain people to ignore its requirements.

So the same may well be said of this illegal custom which has grown up among certain business interests dealing in job lots, of ignoring the requirements of Section 3440, if it suits their convenience to do so. Notwithstanding this custom, when they are caught, they must pay the penalty.

Now that we have moralized sufficiently on this subject, we shall turn to a discussion of the law as it existed at the time of the transaction.

The Law.

Section 3440 of the Civil Code of California at that time provided that:

> "The sale, transfer or assignment of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor, or assignor, * * * will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, (or) assignor, * * * unless at least seven days before the consummation of such sale, transfer, (or) assignment * * * the vendor, transferor, (or) assignor, or the intended vendee, transferee, (or) assignee, * * * shall record in the office of the county recorder in the county or counties in which the said stock in trade * * * is situated, a notice of said intended sale, transfer, assignment, * * * stating the name and address of the intended vendor, transferor, (or) assignor, and the name and address of the intended vendee, transferee, (or) assignee, and a general statement of the merchandise or property intended to be sold, assigned, (or) transferred * * * and the date when and the place where the purchase price or consideration, if any there be, is to be paid; and shall publish a copy of such notice in a newspaper of general circulation published in the township in which such transfer or assignment is intended to be made, if there be one, and if there be none in such township, then in such a newspaper in the county embracing such township, at least once, which publication shall be completed not less than two days before the date of such intended sale, transfer, (or) assignment."

Section 70e of the National Bankruptcy Act provides:

> "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act, which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.
>
> "All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State Laws.
>
> "For the purpose of such recovery or of the avoidance of such transfer or obligations, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

There is no dispute but that at the time of this transfer, the bankrupt was indebted to two creditors, Elsie Bleich, in the sum of $2,200.00, and Elmer Sikorski, in the sum of $250.00, and the Court so found. [Finding X, Tr p. 34.] Either of these creditors, had bankruptcy not intervened, could have avoided this transfer and the trustee succeeded to their rights and is also entitled to avoid it for the benefit of the bankrupt estate. See *Moore v. Bay*,

284 U. S. 4. Or in the alternative, if deemed to the best interests of the bankrupt estate, he may recover the value of the property. *Buffum v. Barceloux,* 289 U. S. 227.

Exhaustive research on the part not only of the writer of this brief, but of able counsel for the appellant and Judge Carter, the trial Judge, discloses that California cases construing the bulk sales provisions of Section 3440 of the Civil Code are conspicuous by their absence and that the only two decisions in this jurisdiction construing these provisions insofar as they concern the disposition of a substantial part of the stock in trade of a retail merchant, are decisions of this Court, both of which are touched on and discussed in appellant's brief. We refer to *Schainman v. Dean,* 24 F. 2d 475, and *Markwell & Co. v. Lynch,* 114 F. 2d 373. This case was exhaustively briefed in the District Court by both parties and orally argued at its conclusion, and Judge Carter in rendering his decision, has relied very strongly on those two decisions by this Court construing the meaning of "a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor." We do not believe that decisions of other Courts in other States will govern. It is true that the Arkansas Supreme Court in *Fiske Rubber Co. v. Hayes,* 131 Ark. 248, held that $150.00 worth of accessories out of a stock of $1500.00 was not a "material portion of the stock within the meaning of the Arkansas Bulk Sales Act" and that the Supreme Court of North Carolina in *Armfield Co. v. Saleeby,* 178 N. C. 298, held that 179 barrels of apples worth $450.00 out of a grocery stock in trade worth $3,000.00 to $5,000.00 was not a sufficient portion to bring the transaction within the Bulk Sales Act of that State. The Court will notice that those

cases involved statutes or rules of law which interdicted sales of a "large part or the whole of a stock of merchandise," or "a major part of such stocks." In the case of *Fudge v. Brown,* 218 Pac. 251, cited by the plaintiff, the Washington statute involved interdicted sales of "substantially the entire business or trade theretofore conducted by the vendor." Each of these Bulk Sales Acts were worded differently than our Section 3440, and this Court has twice been called upon to construe it.

In *Markwell Co. v. Lynch,* 114 F. 2d 373, a retail jeweler borrowed $300.00 from the appellant and pledged with it a comparatively small portion of his stock. The value of the jewelry pledged was $600.00. The bankrupt's stock in trade amounted to approximately $9,500.00. The District Court following the rule laid down in *In re Convisser,* 9th Circuit, 6 F. 2d 177, set the pledge aside and rendered judgment in favor of the trustee. On appeal to this Court, this Court held that the $600.00 worth of merchandise so pledged constituted a substantial part of the bankrupt's stock in trade in the following language:

> "It should be borne in mind that the statute does not prohibit transfers of this sort. A valid pledge may be made if proper notice has been given so that those extending credit to the transferor may be put on their guard and enabled to protect themselves. We see no good reason to reverse the judgment. Affirmed."

Judge Denman who dissented, dissented on the sole ground that Section 3440 did not interdict a pledge of a substantial part of the bankrupt's stock in trade as distinguished from a sale, transfer, or assignment. We believe that the jewelry involved in this case consisted of three diamond rings, although it does not appear in the

opinion of this Court. In the other case cited in the lower Court, *Schainman v. Dean,* 24 F. 2d 475, Paul Schainman, a speculator, purchased from Isidore Lichtenberg, who later became a bankrupt, merchandise of the value of $4,000.00 out of a total stock running between $20,000.00 and $25,000.00. Judgment was rendered against him for the value of the merchandise for the reason that neither of the parties to the transaction had complied with Section 3440. On appeal, after pointing out that the trustee had the option to sue for either the goods, or their value, this Court affirmed the judgment of the lower Court in the following language:

> "The next contention is that the sale did not embrace a substantial part of the stock in trade. It appears from the testimony that the value of the stock transferred was the amount of the judgment, or approximately $4,000. It further appears that the value of the entire stock in trade at the time of the transfer, or transfers, was from $20,000 to $25,000. It is manifest from the testimony that the sales were not made in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, and inasmuch as it appears that almost the entire stock in trade was sold at or about the same time, in the same manner, we think the court below was warranted in finding that the sale did involve a substantial part of the stock in trade, and came within the purview of the statute.
>
> "It appeared incidentally at the trial that the purchase money derived from the sale of the goods was paid to certain creditors of the bankrupt, but this fact of itself would constitute no defense to an action at law for the recovery of the goods, or their value. If the transaction was free from actual fraud, or fraud in fact on the part of the purchaser, it may be

> that this disposition of the purchase money would entitle him to some relief under proper pleadings; but even this is questionable. The statute declares in express terms that a sale made without giving the requisite notice is conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, and, as said by the court in Calkins vs. Howard, 2 Cal. App. 233-236, 83 P. 280-281: 'This presumption is incontrovertible. Where the law makes a certain fact a conclusive presumption, evidence will not be received to the contrary.' And if, as against the purchaser, the transfer is conclusively presumed to be fraudulent, neither law nor equity will relieve him from the consequences of his acts."

We might observe in passing, that appellant lays some stress on the fact that it appeared in the *Schainman* case that almost the entire stock of trade was sold at or about the same time in the same manner (Appellant's brief, p. 15). That would be of no concern to the appellant, Schainman, in that case, and certainly would not constitute any defense to this defendant here. It may be, that in the *Schainman* case, there was a taint of actual fraud and that evidence was adduced for the purpose of showing possible actual fraud, that other similar sales had been made at or about the same time, thus depleting the bankrupt's stock. However, the *Schainman* case turned on violation of Section 3440 and nowhere in the opinion do we find any language which would indicate that there was actual fraud in the transaction such as appeared in the case of *Brainerd v. Cohn* (C. C. A. 9th), 8 F. 2d 13. In the case of *Brainerd v. Cohn*, the opinion clearly shows that there was actual fraud and a conspiracy, but included in the pattern of fraud was a violation of Section 3440 of the Civil Code of California. We do not contend that

Mr. Jubas was guilty of any actual fraud. His career in his field, to the writer's knowledge, over a period of years has been honorable. We do contend, however, that he was guilty of carelessness in his dealings with the bankrupt and in this respect fell afoul of the law, and that custom on the part of a certain few persons in ignoring the Bulk Sales Law cannot be invoked to excuse him.

Conclusion.

We agree with counsel for the appellant that the amount involved in this case from the dollar view point, is comparatively small, but that the legal issue involved is of great importance. The trial court gave Mr. Jubas the benefit of every possible doubt. It declined to render judgment against him for these shoes at the rate of $1.25 per pair, the price at which Jubas resold them. [Testimony of Simon B. Jubas Tr. p. 58], but rendered judgment only at the rate of $1.00 per pair, the purchase price which he had paid for them. The testimony of the bankrupt was that he had paid $5.25, $5.75 to $8.50 for these shoes when he bought them. [Tr. p. 43.] As pointed out before, all that was necessary to have insured the safety of this transaction would have been to record the Notice required and publish it. Mr. Jubas testified at page 56 that the shipment consisted of shoes that were purchased immediately after the war, so as heretofore pointed out, seven days delay would not have made any difference. He admits that he was familiar with the Bulk Sales Law of California. [Tr. p. 58.] He admits that on some occasions he complied with it, when he was purchasing an entire stock even as low as $150.00. [Tr. pp. 58, 59.] He admits that he had read the statute in question. [Tr. p. 61.] Only carelessness on his part, or

haste to close the bargain, prevented his recording the requisite Notice.

We do not think that this case, involving comparatively a small amount, should be permitted to constitute an entering wedge by which Section 3440 can be gradually undermined. If 1240 pairs of shoes out of close to 5,000 pairs [Tr. p. 43] will now be held by this Court to not constitute a substantial part of a stock in trade of a retail merchant, then this Court may later be asked to declare that 12,400 pairs of shoes out of a stock of 50,000 pairs, does not constitute a substantial part of such stock, and so on *ad infinitum*.

We respectfully submit that the judgment of the District Court should be affirmed.

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